SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 391

LEWIS E. NASH,

Petitioner,

vs.

PETER RAUN

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion in the United States District Court is reported in the Appendix at Page 186-A.

The opinion in the United States Circuit Court of Appeals for the Third Circuit is reported in the certification of the record at Page 195; and 149 Federal 2nd 885.

Jurisdiction

1. The date of the judgment to be reviewed is May 14, 1945 (R. 199).

The date of the denial of petitioner's petition for rehear-

ing in the United States Circuit Court of Appeals is June 13, 1945 (R. 212).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Act of Congress, March 3, 1891, c. 517, Section 6, 26 Stat. 828; March 3, 1891, c. 231, Section 240, 36 Stat. 1157; February 3, 1925, c. 229, Section 1, 43 Stat. 938; 28 U. S. Code Annotated, Section 347.

3. The United States Circuit Court of Appeals for the Third Circuit had no power under the United States Constitution to reverse the United States District Court and render a judgment for the respondent; such a reversal was an invasion of the province of the jury. In the United States District Court the jury had rendered a verdict and judgment in favor of the petitioner in the amount of Thirteen Thousand Five Hundred ($13,500) Dollars. Briefly the facts upon which that judgment were based may be summarized as follows:

The petitioner brought a civil action for damages founded on an automobile accident which occurred on October 9, 1941, in Erie County, Pennsylvania. He was seriously injured when a heavy truck driven by the respondent collided with an automobile driven by petitioner at the intersection of Route 89 and Station Road. One witness at the scene of the accident testified that visibility was reduced by a fog so that an automobile could not be recognized as such from a distance greater than "from 5 to 6 feet" (R. 33).

The respondent admitted at the trial of the case that he was driving at the rate of from 25 to 30 miles per hour at the time of the collision. In reversing the Trial Court, the Circuit Court arbitrarily refused to consider the testimony quoted above and deliberately relied upon the testimony of another of petitioner's witnesses that the visibility at the time of the collision "reduced the range of vision to from

50 to 100 feet." This attempt by the Circuit Court to select the testimony upon which its decision must depend is in direct violation of any case in the United States Supreme Court and of the Pennsylvania Supreme Court and of the United States Circuit Court of Appeals.

At the trial of the case, the respondent made a motion for a directed verdict but neglected to file any specific reasons for the motion. This was in direct violation of the requirements of Rule 50 of the United States District Court.

4. The cases believed to sustain said jurisdiction are as follows:

Florence J. Bailey v. *Central Vermont Railway, Inc.*, 319 U. S. 350.

Mary Tennant v. *Peoria & Pekin Union Railway Company*, 321 U. S. 29.

Montgomery Ward & Company v. *Luther Duncan*, 311 U. S. 243.

Leroy A. Berry v. *United States of America*, 312 U. S. 450.

Howard Breisch v. *Central Railroad of New Jersey*, 312 U. S. 484.

H. J. Jenkins v. *James M. Kurn*, 313 U. S. 256.

Margaret Conway v. *George H. O'Brien*, 312 U. S. 492.

Edward J. Gunning v. *Gertrude L. Cooley*, 281 U. S. 90.

Aetna Insurance Company v. *John M. Kennedy*, 301 U. S. 389.

Zillah Lyon v. *Mutual Benefit Health & Accident Assn.*, 305 U. S. 484.

Hegarty v. *Berger*, 302 Pa. 221.

Statement of the Case

This has already been stated in the preceding petition under Summary Statement of the Matter Involved which is hereby attached and made a part of this brief.

Specification of Errors

The Circuit Court of Appeals for the Third Circuit erred in holding that the "order of the said District Court denying defendant's (respondent's) motion to set aside the verdict and judgment be, and the same is hereby reversed, with costs, and entry of judgment for the defendant (respondent) is directed. The order denying a new trial is affirmed."

ARGUMENT

Summary of the Argument

Point A. The petitioner was denied the right of a trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

Point B. The Circuit Court of Appeals was without power, under the law and the Constitution, to reverse the Trial Court's judgment and verdict in favor of the petitioner.

Point C. The respondent's neglect to comply with the requirements of Rule 50 of the United States District Court should have prevented the consideration by the United States Circuit Court of Appeals of the motion for a verdict notwithstanding the judgment.

Point D. The Circuit Court of Appeals did not apply the specific Pennsylvania statutory definition of negligence and of the "assured clear distance ahead principle."

Point E. The order of the Circuit Court of Appeals reversing the Trial Court does not conform to the established precedents of the Pennsylvania Supreme Court, and particularly of the United States Supreme Court in the cases enumerated below.

1. *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350.

2. *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29.

Point F. The reversal by the Circuit Court of Appeals establishes a precedent directly in conflict with the well-founded legal principle that the evidence supporting the verdict must be proved untrue by incontrovertible physical facts.

Point G. On the merits of the case, the question of the negligence of the respondent should properly have been left to the determination of the jury.

Point A

The petitioner was denied the right of a trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

Amendment 7 of the United States Constitution—

> "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

In many recent decisions of the United States Supreme Court the citizen's right to a trial by jury in civil cases has been jealously protected.

An article appearing in 54 Harvard Law Review at Page 694 goes so far as to say that, "Rule 50 of the United States District Court is the latest device to avoid the common law prohibition against awarding judgment notwithstanding the verdict on the basis of the evidence. The problem, however, is largely one of the court's own creation since it is only a much criticized 5-4 decision that perpetuates the prohibition by reading it into the 7th Amendment."

In the case at bar the Circuit Court of Appeals usurped the function of the jury and by substituting its determina-

tion of the facts for the determination made by the jury and the Trial Court has effectively denied the right to a trial by jury. To permit such a precedent to stand is to make meaningless Amendment 7 to the United States Constitution.

In the case of *Tennant* v. *Peoria & Pekin Union Ry. Co.*, reported in 321 U. S. 29, the Court said:

> "We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation."

This case was submitted to the jury on the allegation that Tennant's death resulted from respondent's negligence, in that its engineer backed the train and cars without first ringing the engine bell. There was no direct evidence as to Tennant's precise location at the time he was killed. There was some evidence to indicate that he never walked back on either side of the engine. It was his duty as a switchman to stay ahead of the engine and protect it from other train movements and attend to the switches. No witness testified to the manner in which Tennant died. His body was found upon the railroad track.

In this case the Court said that "petitioner was required to present probative facts from which the negligence and causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the 12 jurors."

In the case at bar witness Mrs. Jones testified that the fog at the scene of the accident was so thick that an automobile could not be recognized as such at a distance of

from more than Five to Six (5-6) feet. The Circuit Court of Appeals arbitrarily ignored the existence of that testimony upon which the jury could have based its verdict. The Circuit Court of Appeals arbitrarily concluded that the visibility at the scene of the accident was limited by fog to from Fifty to One Hundred (50-100) feet. It can hardly be assumed that this was an oversight, because the petitioner in his request for a rehearing called the Court's attention to the testimony of Mrs. Jones. We believe it is particularly important here to note the specific grounds upon which the Circuit Court of Appeals based its reversal of the Trial Court and the jury verdict.

We quote directly from the opinion of the Circuit Court of Appeals:

> "While the testimony showed that defendant's vision ahead was limited by the fog to from 50-100 feet the skid marks on Route 89 extended for only 30 feet before reaching the center of the intersection. If the defendant could have stopped his truck within the distance he could clearly see ahead, i.e., 50-100 feet it cannot be said that he was driving at a negligently excessive rate of speed, there being no other variable factors present."

From this quotation it can be clearly seen that the entire decision of the Circuit Court of Appeals is based upon the arbitrary refusal of the Circuit Court to consider the evidence of the existence of a fog so thick that an automobile could not be recognized as such from a distance of more than Five to Six (5-6) feet.

That is why we say that to permit such a precedent to stand is to establish a principle never before asserted, and a principle that has been specifically denied in so many cases that have appeared before the highest tribunal of the State of Pennsylvania that we deem it needless to enumerate the various citations. The petitioner in the case

at bar did not receive a trial by jury. The Circuit Court of Appeals substitutes its finding of fact for that of the jury.

In *Bailey* v. *Central Vermont Railway, Inc.*, reported in 319 U. S. 350, the U. S. Supreme Court reversed the Supreme Court of Vermont's reversal of the trial judgment for petitioner. Here the Court said:

> "The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions. The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence."

The Court cited *Jacob* v. *City of New York*, 315 U. S. 752. Again we quote from the court's decision:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The court held that the evidence of respondent's negligence in failing to provide Bailey with a safe place to work was sufficient to support the verdict of the jury and the judgment of the trial court, and in so holding, reversed the Supreme Court of the State of Vermont.

We cite the case of *Jacob* v. *City of New York*, reported in 315 U. S. 752. This case was brought up on a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment affirming a judgment of the District Court dismissing a complaint in a suit under the Jones Act by a ferry boat employee for personal injuries. The United States Supreme Court reversed and remanded. In the opinion the Court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of Federal jurisprudence, which is protected by the

> Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it."

The wrench petitioner was using had become defective for the purpose for which it was designed, and petitioner had on several occasions requested his employer to supply him with an adequate wrench. The Court said:

> "We think these facts entitled petitioner to have the jury consider whether his injury was caused by any defect or insufficiency due to its (respondent's) negligence in its appliances. That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use."

We cite *Lyon* v. *Mutual Benefit Health & Accident Association*, 305 U. S. 484. On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment reversing a judgment of the District Court for plaintiff in an action on a health and accident insurance policy. Reversed by the United States Supreme Court.

The court said:

> "While litigants in Federal Courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States, the local Arkansas rule followed by the District Court does not result in such depravation. In effect, that local rule is practically identical with the Federal rule which treats a request by both parties for peremptory instructions without more, as a submission of issues of fact to the Court. It is essential that the right to trial by jury be scrupulously safeguarded, and a State rule of procedure entrenching upon this right would not require observance by Federal courts. However, this Arkansas procedural rule—so closely approximating the Federal rule—does not amount to a prohibited invasion of Federal rights."

The Court held that a request for peremptory instruction by appellant, and the giving of the peremptory instructions by the Court for the adverse party was tantamount to submitting the question to the court sitting as a jury, and the court's finding became a verdict as much as if it had been rendered by a jury upon the issues and the evidence.

> "So the question presented by this record is not whether there was sufficient evidence in the record to warrant the court in sending the case to the jury upon the issue or whether or not the undertaking was collateral, but the question is, was there any legal evidence to support the finding of the court that the undertaking was original?"

Under the precedents established by the Supreme Court and those cited above, it is clear that the petitioner in the case at bar was deprived of his right of a trial by jury as guaranteed to him by the Seventh Amendment of the United States Constitution.

Points B and C

The Circuit Court of Appeals was without power, under the law and the Constitution, to reverse the trial court's judgment and verdict in favor of the petitioner.

The respondent's neglect to comply with the requirements of Rule 50 of the United States District Court should have prevented the consideration by the United States Circuit Court of Appeals of the motion for a verdict notwithstanding the judgment.

We feel that Points B and C can best be discussed together.

Rule 50 of the United States District Court obligates the respondent to state specific grounds on which he bases his motion for a directed verdict. On October 5, 1943, the judgment was duly entered in favor of the petitioner and against the respondent (181a of the Appendix). On October 8, 1943, the respondent filed a written motion for directed verdict (184a of the Appendix). This motion fails to comply with the requirements of Rule 50, for the reason that it neglected to state any specific grounds on which the motion was based. The very existence of Rule 50 is an attempt to deprive a citizen of the right of a trial by jury according to the rules of the common law. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an Appellate Court for some error of law which intervened in the proceedings. Rule 50 being in derogation of the petitioner's right under the common law, should be strictly construed against the user of the rule. So that the specific requirement that the respondent should file grounds for the rule is an obligation that cannot be lightly dismissed; and the failure of a respondent to strictly

comply with the requirements of the rule should certainly deprive him and the Appellate Court from further considering the motion for a directed verdict.

We cite *Berry* v. *U. S. of America,* 312 U. S. 450. On a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment reversing a judgment of the District Court of the United States. Reversed by the Supreme Court. The petition for Certiorari presented two questions: (1) Whether there was sufficient evidence to sustain the veredict; and (2) Whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. The Court said:

> "This second question envoked our jurisdiction in order to obtain an authoritative construction of Subdivision B of Rule 50 of the Rules of Civil Procedure. In part, that subdivision provides, whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict. Since the Government made no such motion within ten days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause, but should have remanded it for a new trial. But while this important point upon which the Circuit Court of Appeals are not in complete agreement, is one of the two questions upon which the petition for Certiorari rested, there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court

> properly denied the Government's motion for a directed verdict in its favor."

Again the court said:

> "Rule 50 goes further than the old practice, in that District Judges under certain circumstances are now expressly declared to have the right to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the Constitutional tribunal provided for trying facts in courts of law."

In the *Galloway* case cited below, the Court said, the guarantee of a jury trial in suits at common law, given by the Seventh Amendment to the Federal Constitution, and the provision of that Amendment that no fact tried by a jury shall be otherwise re-examined in any court than according to the rules of the common law, does not bind the Federal Courts to the exact procedural incidents or details of court trial according to the common law of 1791, nor confine them, in their regulation of the jury's rule on questions of fact, to the two methods then generally used, i.e., the demurrer of the evidence and the motion for a new trial. But the *Galloway* case was an action against the United States Government, and thus clearly distinguished from the case at bar, for there existed under the common law no right to proceed by a legal process against the sovereign. And this distinction was clearly made in the opinion of the *Galloway* case.

It is one thing for a trial court to grant a motion for a directed verdict; it is quite another and a different thing for the Circuit Court of Appeals to entertain such a motion.

As pointed out by Justice Black in his dissenting opinion in the *Galloway* case, Alexander Hamilton emphasized

our meaning when he declared, "Jury verdicts should be re-examined if at all, only by a second jury, either by remanding the case to the court below for a second trial of the fact or by directing an issue immediately out of the Supreme Court." To cast overboard the jury's verdict and the trial court's opinion is a judicial act that requires the closest possible scrutiny, and, we submit, was in the case at bar a direct violation of petitioner's right under the Constitution. The Circuit Court of Appeals had no power to promulgate such an order, and surely on the merits of the case the reversal cannot be justified. This we should like to discuss further on in the brief.

POINT D

The Circuit Court of Appeals did not apply the specific Pennsylvania statutory definition of negligence and of the "assured clear distance ahead principle."

As amended in 1939 and 1941, April 5, P. L. 17, No. 10, Sections 1 and 2, and as fully reported in 75 Purdon's Pennsylvania Statutes, Annotated, Section 501, the specific Pennsylvania "assured clear distance ahead principle" is promulgated as follows:

> "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic surface, and width of the highway, and of any other restrictions or conditions then and there existing; and no person shall drive any vehicle, upon a highway at such a speed as to endanger the life, limb, or property of any person, nor at a speed greater than will permit him to bring the vehicle to a stop within the assured clear distance ahead."

What is the assured clear distance ahead varies according to visibility and other conditions.

In *Janeway* v. *Lafferty Bros.*, reported in 323 Pa. 324, the Court said:

> "This, as we held in Stark v. Fullerton, 318 Pa. 541, requires that a driver keep his car under such control that he can always stop within the distance that he can clearly see, this distance, of course, varies with the circumstances. The range of vision may be shortened by storm, fog or other conditions."

In *Lauerman* v. *Strickler*, reported in 141 Pa. Superior 240, the Court said:

> "This implies that the driver will always be carefully watching so much of the road as is included within that assured clear distance ahead and will always keep his car so under control that he can stop it within that distance. What this will be, of course, will vary according to the visibility at the time and other attending circumstances, but, after taking those circumstances into consideration, the requirement is fixed and unchangeable."

In *Rocco* v. *Tillia*, 106 Pa. Superior 597, the Court said:

> "It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his lights, or within the distance to which his lights would disclose the existence of an obstruction. If the lights on the automobile would disclose obstructions only 10 yards away, it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance."

The Pennsylvania Supreme Court in *Shoffner* v. *Schmerin*, 316 Pa. 323, has held that:

> "Fog may be so dense on the highway that to proceed at any rate of speed is imprudent."

This specific Pennsylvania statutory principle is so well established by decisions of the Pennsylvania Supreme Court and Pennsylvania Superior Court and recognized by decisions of the Federal Courts, that it is hardly necessary to extend the argument that a respondent who drives his automobile at the rate of 25-30 miles per hour through a fog so thick that an automobile could not be recognized as such from a distance of more than Five to Six (5-6) feet is guilty of negligence. And yet that is the case at bar. This case necessarily establishes the principle that a respondent can safely drive an automobile at 30 miles per hour through a fog with a restricted visibility to Five to Six (5-6) feet and seriously injure a citizen and a jury of Twelve men can be persuaded that he was guilty of negligence, and yet the Circuit Court can throw it all overboard and declare that such handling of an automobile under such a set of circumstances was not negligence.

The necessary consequences of such a precedent is to deprive American citizens of their right of trial by jury in civil cases.

Point E

The order of the Circuit Court of Appeals reversing the Trial Court does not conform to the established precedents of the Pennsylvania Supreme Court, and particularly of the United States Supreme Court in the cases enumerated below:

1. *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350.

2. *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29.

Both of the cases cited above have been reviewed in this brief.

The United States Supreme Court has held in *Gunning* v. *Cooley*, 281 U. S. 90, that:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

In *Scalet* v. *Bell Telephone Co. of Pa.*, reported in 291 Pa. 451, the Court said:

"The assignment of error complained only of the refusal to give binding instruction for defendant. Under these circumstances all the evidence and inferences therefrom favorable to plaintiffs, must be taken as true and all unfavorable to them, if dependent solely on testimony must be rejected. When these matters are the only ones to be considered, the courts do not inquire whether one party or the other has the weight of the evidence. On the questions actually raised by the assignment, the only point we are asked to decide is, do the verdicts depend for their support on evidence which is shown to be untrue by incontrovertible physical facts, and contrary to human experience and the laws of nature."

"Incontrovertible physical facts" is defined in *Hegarty* v. *Berger*, 302 Pa. 221, as follows:

"We have frequently held that incontrovertible physical facts are never established by oral evidence as to position, speed, etc., of movable objects."

In the case at bar Mrs. Jones testified, as we have referred to above, that the visibility at the scene of the accident was reduced by fog so that an automobile could not be recognized as such at a distance greater than Five to Six (5-6) feet. This evidence the Circuit Court of Appeals could not

overlook. It was the basis for the foundation of the jury's verdict in favor of the petitioner and taken together with the admission of the respondent that he was traveling at 25-30 miles per hour at the time of the collision it establishes beyond all question the negligence of the respondent.

But the Circuit Court of Appeals did either overlook the evidence of Mrs. Jones or refuse to apply the specific Pennsylvania statutory "assured clear distance ahead principle", and in either event the decision should be reversed. It is perhaps significant to note at this point that in the report of *Nash* v. *Raun*, 149 Federal 2d 885, the syllabus carries the following paragraph:

Paragraph 2 under Automobiles Key #168 (8):

> "Where fog limited visibility to from Fifty to One Hundred (50-100) feet, a truck driver who could stop within such distance could not be said to be driving at a negligently excessive rate of speed, if no other variable factors were present."

This is a recorded precedent which does not under the argument submitted in this point describe the facts of the case at bar.

Did the Circuit Court of Appeals eliminate the testimony of Mrs. Jones? If so, the certiorari should be granted because the decision is not in conformity with the referred to decisions of the Pennsylvania Supreme Court and to decisions rendered in other Circuits of the United States Circuit Court of Appeals.

And we might ask another question. In thus reversing the Trial Court, can the Circuit Court of Appeals be permitted to so befog the true issues in this case that the petitioner would be effectively deprived of his right of trial by jury?

If that is so, then we must face the fact that the right of trial by jury is restricted and limited. The citizen,

under that ruling, has the right of trial by jury only if the jury happens to guess the Circuit Court's appraisal of the facts. It need hardly be argued that the inevitable consequences of such a principle is the total destruction of the right of trial by jury.

Point F

The reversal by the Circuit Court of Appeals establishes a precedent directly in conflict with the well founded legal principle that the evidence supporting the verdict must be proved untrue by incontrovertible physical facts.

We deem it unnecessary to add to the citations contained above under Point E.

In *Kindt* v. *Kramer*, 43 Atlantic 2d 145, the Court said:

> "Judging the credibility of a witness and the weight of his testimony is jury's function."

Point G

On the merits of the case, the question of the negligence of the respondent should properly have been left to the determination of the jury.

In addition to the negligence of the respondent which we have pointed out particularly under Point E, we wish to call the Court's attention to the opinion of the Trial Judge (189-A):

> "The evidence from which plaintiff contends that negligence on the part of the defendant could be inferred by the jury is as follows: (1) the noise of the collision heard by the Jones family at their home some three hundred feet away from the scene of the accident; (2) The damage to plaintiff's automobile (shown in Plff's Ex. No. 2), which indicates that plaintiff's automobile was struck by defendant's truck on the side with great force; (3) The damage to defendant's truck, i. e., the damaged headlights and bent front axle—in-

dicating that the truck ran into the side of plaintiff's automobile; (4) The position of plaintiff's automobile after the accident, indicating that it must have been running at low speed at the time of the collision; (5) The position of the defendant's truck after the accident, indicating that it must have been running at high speed at the time of the collision; (6) The skid marks on Route 89 on the right side (east lane of traffic) for a distance beginning thirty feet south of the intersection, indicating defendant must have applied his brakes thirty feet from the intersection, and must have been proceeding at high speed, as shown by the fact that the truck proceeded north of the intersection for a distance of more than fifty feet when the truck turned over on its right side, skidding several feet in a northerly direction; (7) Evidence that plaintiff was found lying unconscious at a distance of some twelve feet from the place where his car came to rest, disclosing the force of the collision; (8) Evidence that the engine of the plaintiff's car was still running after it came to rest, indicating that the gear of his car was in neutral at the time of the collision, and that the plaintiff was in the process of changing gears at the time the collision took place; (9) Evidence that seventy-five milk cans from defendant's truck were scattered over the pavement at the scene of the accident, showing the force of the collision; (10) Evidence of poor visibility at the scene of the accident on account of fog, indicating the defendant was traveling too fast as he approached the intersection."

We concede that the mere proof of an accident is insufficient to establish negligence. But we submit that this array of circumstantial evidence can surely be relied upon to establish negligence.

In answer to these circumstances the respondent relies on his uncorroborated testimony that there existed no fog at the scene of the accident; that he was traveling at 25-30 miles per hour; that he never saw the petitioner

until he was about Six (6) feet away from him; and that the petitioner was traveling at a high rate of speed.

It is apparent that the Circuit Court adopted as conclusive the testimony of the respondent "that plaintiff's car flashed into view from the right going about 50 miles per hour when defendant was about six feet from the intersection; and that although he applied the brakes he was unable to avoid the collision."

The jury were certainly justified, from the circumstances surrounding the happening of this accident, the other testimony of Mr. Raun and that of his witness, Mr. Arthur Scholton, whose testimony was discredited and contradicted by himself and other witnesses, in concluding that his was not the right description of the happening of the accident.

We do not hesitate to go further and to say that the jury could well have determined that the accident could not have occurred in the manner in which Raun described it, that his description of the accident is controverted by the physical facts. We refer particularly to the hump hazard which would prevent a car approaching Route 89 from the east on Station Road traveling over that hump hazard at any but a very slow rate of speed.

We deem it appropriate here to discuss the strange testimony of Arthur D. Scholton. It is particularly significant that such a star witness should have received only slight consideration in the brief of the respondent filed before the Circuit Court of Appeals. We can understand the embarrassment of the respondent when we examine carefully the discredited evidence of this witness. The jury surely had a right to conclude that the witness discredited himself. His elaborately concocted story to justify his presence at the scene of the accident was also discredited by petitioner's rebuttal witness, Mr. Roy Butler. (155-A) (154-A) (157-A) (138-A) (139-A) (151-A) (152-A).

Obviously the jury did not believe the testimony either of Mr. Scholton or the respondent, Mr. Raun. The disbelief of the jury could not, under the law, be attacked by the Circuit Court of Appeals; and it is just as obvious that the jury did believe the testimony of Mrs. Jones and other witnesses for the petitioner. The Circuit Court of Appeals has no power, under the law, to question the credibility of the witnesses whom the jury and the Trial Judge saw fit to believe.

We think that Oliver Wendell Holmes, Jr., in "The Common Law," has clearly defined the function of the Court and jury:

> "Many have noticed the confusion of thought implied in speaking of such cases as presenting mixed questions of law and fact. No doubt, as has been said above, the averment that the defendant has been guilty of negligence is a complex one: first, that he has done or omitted certain things; second, that his alleged conduct does not come up to the legal standard. And so long as the controversy is simply in the first half, the whole complex averment is plain matter for the jury without special instructions, just as a question of ownership would be where the only dispute was as to the fact upon which the legal conclusion was found. But when a controversy arises on the second half, the question whether the Court or the jury ought to judge of the defendant's conduct is wholly unaffected by the accident, whether there is or is not also a dispute as to what the conduct was."

It is clear that the jury's determination that the respondent has done or omitted certain things cannot be obliterated by any act of the appellate Court.

It is perhaps unnecessary to say that our only purpose in this proceeding is to prevent the establishment of a precedent which will encroach upon the citizen's right of

trial by jury under the 7th Amendment of the United States Constitution.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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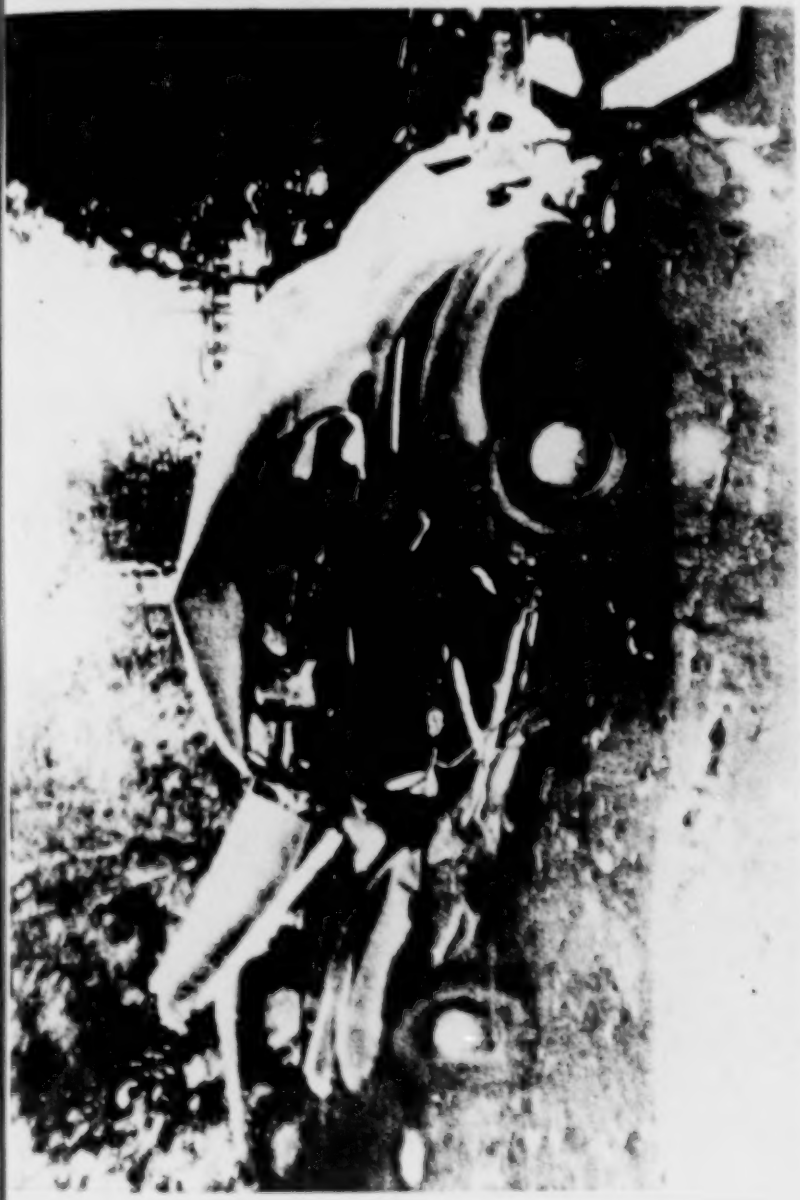
MAURICE J. COUGHLIN,
Counsel for Petitioner.

PLAINTIFF'S EXHIBIT 2



DEFENDANT'S EXHIBIT "C'